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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 75-1413

WAYNE A. STANTON, Administrator of the Indiana State Dept. of Public Welfare, et al.,
Petitioners,

vs.

LOUISE BOND, et al.,
Respondents.

BRIEF OF THE STATE OF CALIFORNIA AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

The State of California employs over 130,000 persons and, under state law, defends any employee or former employee against any claim or action arising out of an act or omission occurring within the scope of his employment. Calif. Gov. Code § 825, *et seq.* Imposition of attorneys' fees, even in a small percentage of cases, will have a direct and significant

impact on the funds and fiscal management of the State of California. Resolution of the Eleventh Amendment issue in relation to a federal court's power to grant attorneys' fees against a state official is, therefore, of significant interest to amicus.

SUMMARY OF ARGUMENT

The Eleventh Amendment to the United States Constitution bars the recovery of attorneys' fees from a state treasury. Those circuits which have held otherwise have misconstrued this Court's opinion in *Edelman v. Jordan,* 415 U.S. 651 (1974). This conclusion cannot be altered by labeling an award of attorneys' fees against the state an "equitable remedy" or a "taxation of costs."

An award of attorneys' fees against the state officials cannot be predicated upon the common fund or bad faith exceptions to the American rule prohibiting the award of attorneys' fees. The common fund theory is inappropriate, because no fund will be available from which to reimburse litigants. The bad faith exception cannot support an award of attorneys' fees against the state official in a suit seeking injunctive relief, as the state is the real party in interest and as any award of attorneys' fees would have a direct impact on the state treasury.

ARGUMENT

After this Court's decision in *Alyeska Pipeline Co. v. Wilderness Society,* 421 U.S. 240 (1975), attorneys' fees may not be awarded by a federal court to a prevailing party based on a private attorney general theory. In *dicta,* this Court appeared to recognize that attorneys' fees can be awarded from a common fund or when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. *Id.* at 257-259. In the instant case, amicus submits that the Eleventh Amendment bars an award of attorneys' fees based on the "bad faith" rationale.

I

RECOVERY OF ATTORNEYS' FEES FROM THE STATE IS BARRED BY THE ELEVENTH AMENDMENT.

The Eleventh Amendment to the United States Constitution, ratified in 1798, and unchanged since, provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State."

This Court has consistently held that an unconsenting state is immune from suits brought in federal courts by her own citizens as well as by citizens of another state. *Edelman v. Jordan,* 415 U.S. 651, 662-663 (1974). In the instant case, although the State of Indiana was not named the defendant, any monetary

award for attorneys' fees will obviously not be paid out of pocket of the defendants, but will have a direct impact on the funds and fiscal management of the State of Indiana. *See Edelman v. Jordan, supra* at 665.

In *Edelman,* this Court held that retroactive payment of welfare benefits wrongfully withheld by state officials was barred by the Eleventh Amendment. *Id.* at 662-669. In so holding, this Court stated:

> "'[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.' Thus, the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." (Citations omitted). *Id.* at 663.

In so ruling, this Court specifically distinguished *Ex parte Young,* 209 U.S. 123 (1908):

> "But the relief awarded in *Ex parte Young* was prospective only; the Attorney General of Minnesota was enjoined to conform his future conduct of that office to the requirement of the Fourteenth Amendment. Such relief is analogous to that awarded by the District Court in the prospective portion of its order under review in this case.
>
> "But the retroactive portion of the District Court's order here, which requires the payment of a very substantial amount of money which that court held should have been paid, but was not, stands on quite different footing. These funds will obviously not be paid out of the pocket of petitioner Edelman." *Id.* at 664.

This Court also held that labeling an award "equitable restitution" does not evade the Eleventh Amendment bar. *Id.* at 665-666. Further, it was held that the State of Illinois did not waive its Eleventh Amendment protection or consent to be sued because it had participated in a federal AABD program. *Id.* at 671-677.

Amicus submits that the rationale of *Edelman* applies to respondents' request for attorneys' fees. There is no doubt, as in *Edelman,* that petitioners will not be held personally accountable for such award. Despite individual defendants named, an award of attorneys' fees would have a direct impact upon the funds and fiscal management of the State of Indiana. Any award of attorneys' fees against a state official in such circumstances would impose an unconstitutional burden on a state treasury.

Accordingly, it has been held that the *Edelman* decision compels the conclusion that the Eleventh Amendment bars the recovery of attorneys' fees against a state. *Jordon v. Gilligan,* 500 F.2d 701 (6th Cir. 1974), *cert. denied,* 421 U.S. 991. *Accord, Taylor v. Perini,* 503 F.2d 899, 901, 905 (6th Cir. 1974), *vacated on other grounds* at 421 U.S. 982; *Skehan v. Board of Trustees,* 501 F.2d 31 (1974), *vacated on other grounds* at 421 U.S. 983; *Named Ind. Mem., San Antonio Con. Soc. v. Texas Hwy. Dept.,* 496 F.2d 1017 (5th Cir. 1974), *cert. denied,* 420 U.S. 926; *Hall-*

mark Clinic v. North Carolina Dept. of Hum. Res., 519 F.2d 1315, 1317 (4th Cir. 1975). Significantly, this Court has summarily affirmed a decision of a three-judge district court in the First Circuit which denied an award of attorneys' fees both as a matter of law and discretion. *Murgia v. Commonwealth of Mass. Bd. of Retirement,* 386 F.Supp. 179 (D.Mass. 1974), *judgment affirmed,* 421 U.S. 972.

Amicus recognizes that some circuits have taken the position that an award of attorneys' fees is permissible, on the grounds that such an award has only an "ancillary effect on the state treasury" resulting from compliance with the order of injunctive relief. *Jordan v. Fusari,* 496 F.2d 646 (2d Cir. 1974); *Class v. Norton,* 505 F.2d 123 (2d Cir. 1974); *Souza v. Travisono,* 512 F.2d 1137 (1st Cir. 1975), *remanded on other grounds,* 423 U.S. 809.[1] However, an analysis of *Edelman* does not support the conclusion of these circuits. This Court in *Edelman* did not leave at large what was meant by the phrase "ancillary effect." The phrase comes at the end of a paragraph at 415 U.S. 667-668 in which this Court discusses *Ex parte Young,* 209 U.S. 123 (1908), as well as two of this Court's more recent welfare cases, and notes that the decrees in those cases would have an effect on the

[1]In *Fitzpatrick, et al. v. Bitzer, et al.,* No. 75-251, and *Bitzer, et al. v. Matthews, et al.,* No. 75-283, ___ U.S. ....., ... S.Ct. ....., 44 U.S.L.Week 5120, 5123 (June 28, 1976), this Court held that it need not decide this question, as there was express congressional authority for such an award, which authority was based on the Fourteenth Amendment. In the instant case, there is no congressional authority for the attorneys' fees award, nor could there be under the present Social Security Act. *Id.* at 5122.

states' funds. "But," this Court stated, "the fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature." 415 U.S. at 667-668. This is the "ancillary effect" that this Court describes as permissible.

In the next paragraph, this Court distinguished the decree it was reviewing from those it had referred to:

> "It requires payment of state funds, not as a necessary consequence of compliance in the future with the substantive federal-question determination, but as a form of compensation to those whose applications were processed on the slower time schedule at a time when petitioner was under no court-imposed obligation to conform to a different standard." 415 U.S. at 668.

It can hardly be argued that an award of attorneys' fees can be classified as a "necessary consequence of compliance in the future with a substantive federal-question determination. . . ."

The argument has also been made that since an award of attorneys' fees resembles more closely the incidental costs sanctioned by this Court in *Fairmont Creamery Co. v. Minnesota,* 275 U.S. 70 (1927), such an award is permitted by the Eleventh Amendment. *See Fitzpatrick v. Bitzer, supra,* ..... U.S. ....., ... S.Ct. ....., 44 U.S.L.Week at 5124 (concurring opinion of Stevens, J.). However, this argument must fail for several reasons. First, an award of attorneys' fees has been regarded by this Court as quite unlike

an award of taxable costs. *Sprague v. Ticonic Bank,* 307 U.S. 161 (1939). This distinction has been followed by circuit courts. *See, e.g., Swanson v. American Consumer Industries, Inc.,* 517 F.2d 555, 559-560 (7th Cir. 1975). Secondly, while it is quite true that in *Fairmont, supra,* this Court held that costs could be taxed against Minnesota, it is noteworthy that in that case there is no mention of the Eleventh Amendment. *Fairmont* involved review of a state court decision affirming a criminal conviction. The Eleventh Amendment was not discussed because it had no possible application. The amendment speaks only to suits "commenced or prosecuted *against* one of the united states. . . ." It does not reach a prosecution commenced by the state itself. A state cannot insulate itself from review of its criminal convictions, when they are attacked on federal constitutional grounds, by arguing that under the Eleventh Amendment this Court has no jurisdiction. This much has been settled since the landmark case of *Cohens v. Virginia,* 6 Wheat. (19 U.S.) 264 (1821). Unlike *Fairmont Creamery,* the *civil* suit in the instant case was commenced *against* Indiana. *Fairmont Creamery* has no application to suits commenced *against* a state.

In any event, any argument that *Fairmont Creamery* supports the imposition of attorneys' fees against the state has been put to rest by this Court in *Edelman v. Jordan, supra.* Labeling attorneys' fees as "costs" is as much an evasion of the Eleventh Amendment as labeling retroactive damages "equitable restitution." *Edelman, supra,* at 665-666.

II

AN AWARD OF ATTORNEYS' FEES AGAINST A STATE MAY NOT BE PREDICATED UPON THE COMMON FUND OR BAD FAITH EXCEPTIONS TO THE AMERICAN RULE PROHIBITING AN AWARD OF ATTORNEYS' FEES.

In *Alyeska Pipe Line Service Company v. Wilderness Society, supra,* 421 U.S. 240, this Court disapproved the "private attorney general" approach as a basis for court-awarded attorneys' fees in public interest litigation unless authorized by statute. However, *dicta* in the opinion appears to recognize the continuing validity of the "common fund" and "bad faith" exceptions to the traditional American rule limiting an award of attorneys' fees. *Id.* at 257-259. Amicus submits that the *dicta* in *Alyeska* has no application in the instant case. The Eleventh Amendment bars any such award against the state.

The common fund theory is inapplicable since any fund in a suit against a state official or state agency would necessarily come from the state treasury. However, since *Edelman, supra,* precludes an award of monetary relief from the state treasury, no fund would be available from which to reimburse litigants.

The "bad faith" exception mentioned in *Alyeska* is also inapplicable. This issue was not discussed in *Alyeska, supra,* as the Court of Appeals deemed it inappropriate to burden the State of Alaska with any part of the award. 421 U.S. at 246. Amicus submits that the Eleventh Amendment bars an award of attorneys' fees when injunctive relief is sought against a state official. In such a case, the purpose of the

action is to remedy a state practice, not to impose a monetary liability against the state for past deprivations of constitutional rights. A state official has both the right and the duty to follow state law. When a state law or procedure is alleged to conflict with a constitutional right and a federal suit is filed, the official, as an officer of the state, defends the state interest and, as an officer of the state, will, if ordered, comply with the court order. In such a case the state is the real party in interest. The official is merely a nominal party.[2] To award attorneys' fees on a bad faith theory and without Congressional authority founded on the Fourteenth Amendment is tantamount to an award of attorneys' fees against the state and is therefore barred by the Eleventh Amendment. Granting attorneys' fees in an injunctive suit against a state official by labeling the conduct "bad faith" is as much an evasion of the Eleventh Amendment bar as labeling a retroactive monetary award against a state "equitable restitution." In both cases the real party in interest, the state, is being ordered by a federal court to hand over state funds to a private party. In both cases, the Eleventh Amendment, as explained in *Edelman,* prohibits such an award.

This is not to say that an individual state official cannnot be held personally responsible for a direct and knowing contempt of a federal court order, or that an individual state official cannot be personally

[2]This fact is recognized in Rule 25(d) of the Federal Rules of Civil Procedure, which allows substitution of officials in suits seeking injunctive relief.

liable for damages in a proper suit in which the plaintiff overcomes the official's qualified executive immunity. See *Schuerer v. Rhodes,* 416 U.S. 232, 238 (1973). However, amicus submits that in a contempt proceeding or a damage suit, unlike his position in a suit seeking injunctive relief, the state official is himself the real party in interest.

Redress for the personal acts of state officials during the pendency of an injunctive suit may not be had under the guise of an award of attorneys' fees. Such redress must be sought only in contempt proceedings or a damage action.

CONCLUSION

Amicus submits that the Eleventh Amendment precludes a court ordered award of attorneys' fees against a state.

Dated, San Francisco, California,
July 14, 1976.

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